

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SOUTH BEND DEVELOPMENT, INC.
Plaintiff,

v.

DEPOSITORS INSURANCE COMPANY AND
ADAM GERSTNER
Defendants.

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CIVIL ACTION NO. 5:16-cv-1246

NOTICE OF REMOVAL

Defendants, Depositors Insurance Company and Adam Gerstner (“Defendants”), through undersigned counsel and pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, files this Notice of Removal of the lawsuit captioned *South Bend Development, Inc. v. Depositors Insurance Company and Adam Gerstner*; Cause No. 2016CI19506, in the 225th Judicial District of Bexar County, Texas.

**I.
BACKGROUND**

1. Plaintiff South Bend Development, Inc. (hereinafter “Plaintiff”) initiated the present action by filing its Original Petition in Cause No. 2016CI19506, in the 225th Judicial District of Bexar County, Texas on November 8, 2016 (the “State Court Action”). *See* Plaintiff’s Original Petition, attached as **Exhibit A**.

2. Defendants appeared and answered on December 9, 2016, asserting a general denial to the claims and allegations made in Plaintiff’s Original Petition. *See* Defendants’ Original Answer, attached as **Exhibit B**.

3. Pursuant to 28 USC § 1446(a) all a copy of all process, pleadings, and orders served upon Defendants in the State Court Action are incorporated in **Exhibit A**.

4. Pursuant to 28 U.S.C. § 1446(d), promptly after filing this Notice of Removal, Defendants will give written notice of the removal to Plaintiff through its attorney of record, and to the clerk of the 225th Judicial District Court of Bexar County, Texas.

5. Pursuant to 28 USC §§ 1446(b)(1) and 1446(c)(1) this Notice of Removal has been timely filed within 30 days of service on Defendants of Plaintiff's Original Petition and less than one year after the commencement of this action.

II. JURISDICTION

6. This Court has original jurisdiction pursuant to 28 U.S.C. § 1332, and the matter is removable to this Court pursuant to 28 U.S.C. § 1441(a) because there is complete diversity of citizenship between the properly joined parties and the amount in controversy exceeds \$75,000 exclusive of interest and costs.

A. Diversity of Parties

7. Plaintiff is Texas Corporation, and maintains its principal place of business in the State of Texas. *See Exhibit A, ¶ 2.* Pursuant to 28 U.S.C. § 1332(a), therefore, Plaintiff is a citizen of the State of Texas.

8. Depositors Insurance Company is organized under the laws of Iowa and maintains its principal place of business in Iowa. Pursuant to 28 U.S.C. § 1332(c)(1), therefore, Depositors is a citizen of the State Iowa.

9. Defendant Adam Gerstner is domiciled in Douglas County, Kansas, and is therefore a citizen of the State of Kansas. Plaintiff has incorrectly alleged that Gerstner is "residing in Texas...."

See **Exhibit A**, ¶ 4. However, Plaintiff makes no allegation regarding the citizenship of Gerstner, which is controlled by where he maintains a domicile.¹ To the extent such an allegation of citizenship is implied, such allegation would then be a fraudulent allegation of jurisdictional fact and Gerstner's joinder would be improper.²

10. Accordingly, there is complete diversity between the parties pursuant to 28 U.S.C. § 1332(a).

B. Amount in Controversy

11. Plaintiff's Original Petition states that Plaintiff seeks "monetary relief between \$200,000 (two-hundred thousand) and \$1,000,000.00 (one-million) dollars." See Plaintiff's Original Petition, **Exhibit A**, ¶ 55. The threshold for diversity jurisdiction, \$75,000, is therefore met by the allegations of Plaintiff's Original Petition.

12. Plaintiff further seeks compensation for (1) actual damages, (2) treble damages, (3) 18% penalty interest attorney's fees, (4) pre and post-judgment interest, and (5) attorney's fees. See **Exhibit A**, ¶¶ 46-55. Plaintiff has alleged that Defendants' conduct was wrongful and done knowingly, entitling it to a trebling of actual damages under Texas Insurance Code Chapter 541. See **Exhibit A**, ¶ 54; Tex. Ins. Code sections 541.002 & 541.152. Penalties, exemplary damages, and attorneys' fees are included as part of the amount in controversy.³

¹ *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974) (for diversity purposes, citizenship means domicile; mere residence in the State is not sufficient).

² *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 205 (5th Cir. 2016) (recounting the two ways to establish improper joinder: (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the nondiverse party in state court.)

³ See *H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000); see also *St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998).

13. The amount in controversy plainly exceeds \$75,000, exclusive of interest and costs. *See Exhibit A.* Accordingly, the amount in controversy requirement of 28 U.S.C. § 1332(b) is satisfied.

III. CONCLUSION

14. Removal of this action under 28 U.S.C. § 1441(a) is proper as the district courts of the United States have original jurisdiction over the matter pursuant to 28 U.S.C. § 1332, and as all requirements for removal under 28 U.S.C. § 1446 have been met.

15. WHEREFORE, Depositors Insurance Company and Adam Gerstner hereby provide notice that this action is duly removed.

Respectfully submitted,

/s/ Patrick M. Kemp

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**ATTORNEYS FOR DEFENDANTS
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served upon the following counsel of record via certified mail, return receipt requested on this the 9th day of December, 2016.

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